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No. 80-2209

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a warrantless search, based upon probable cause, of a closed but unsealed paper bag found in the trunk of respondent's automobile during a lawful search of the automobile was permissible under the Fourth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-117a) is reported at 655 F.2d 1159. The opinion of the court of appeals panel (Pet. App. 120a-158a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 118a-119a) was entered on March 31, 1981. On May 21, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 1981. The petition was filed on that date and granted on October 13, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted on one count of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to a term of from 20 months to five years' imprisonment, followed by a six-year special parole term. Both the panel and the en banc court of appeals reversed the conviction.

1. As reflected in the opinion of the en banc court (Pet. App. 4a-6a), evidence developed during a suppression hearing showed that on November 27, 1978, a District of Columbia police detective was told by a reliable informant that he had observed a man known as "Bandit" selling narcotics from the trunk of a maroon two-door Chevrolet Malibu automobile (H. Tr. 4).[1] Upon arriving at the address specified by the informant, the detective, accompanied by two other police officers, observed a vehicle being driven by respondent that matched the informant's description. The officers ascertained that it was registered to respondent, who, they learned, bore the nickname "Bandit" (H. Tr. 5). They then stopped the vehicle, identified themselves, and asked respondent to step out. While one of the officers searched respondent, a second police officer spotted a round of ammunition on the front seat of the car. The officer retrieved the ammunition and searched the interior of the vehicle for weapons, finding a pistol in the glove compartment (H. Tr. 8-10, 49).

After respondent was arrested, the third officer unlocked and searched the vehicle's trunk (H. Tr. 59, 66). The search was conducted because the information re-

[1] "H. Tr." denotes the transcript of the suppression hearing.

ceived from the informant indicated that "there was a quantity of heroin secreted in the trunk of the car" (*id.* at 66). In the trunk, the officer discovered a brown paper lunch bag with a folded but unsealed top and a zippered leather pouch. He opened the paper bag and discovered in it a number of glassine envelopes each containing a white powder. Leaving the paper bag and the leather pouch in the trunk, the officers drove respondent's automobile to the police station. At the station, the officers reopened the paper bag and sent the glassine envelopes to the police laboratory for analysis. Each proved to contain a quantity of heroin. One of the officers then opened the leather pouch as well, and found that it contained $3,200 in currency (H. Tr. 66, 67, 82). No search warrant had been obtained at any point in this sequence of events. On the basis of this evidence, adduced at the suppression hearing, the trial judge denied respondent's motion to suppress the contents of the paper bag and the leather pouch. Respondent was convicted after trial and appealed from his conviction. Pet. App. 123a.

2. On appeal, a panel of the court of appeals reversed respondent's conviction. The members of the panel agreed that, because the police lacked a search warrant, the search of the zippered leather pouch was unlawful, and the currency that was discovered in the pouch should have been suppressed (Pet. App. 137a-138a, 139a). However, a majority of the panel held (*id.* at 124a-137a) that the warrantless probable cause search of the paper bag was permissible because respondent "could not reasonably harbor an expectation of privacy in his paper bag beyond that existing due to actual possession" (*id.* at 136a). Concluding that admission into evidence of the currency found in the pouch was not harmless error (*id.* at 138a n.7), the panel remanded for further proceedings consistent with the opinion.

In distinguishing respondent's paper bag from the leather pouch and other kinds of substantial and secure containers in the nature of luggage, the panel majority relied upon this Court's statement in *Arkansas* v. *Sanders*,

442 U.S. 753, 764 n.13 (1979), that although a warrant is generally required to search luggage seized from a vehicle, absent consent, exigent circumstances, or other recognized predicate for a warrantless search, "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." The panel observed that unsealed paper bags differ from luggage and other common repositories for personal effects in two respects it deemed significant for Fourth Amendment purposes. First, the panel noted the physical and functional attributes of such a container (Pet. App. 134a):

> [P]aper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands.

Second, the panel noted that the conventional uses of paper bags do not include those which require a high degree of privacy, concluding that society recognizes only a limited expectation of privacy in such a container (*ibid.*; emphasis in original; footnote omitted):

> [P]aper bags are not *inevitably* associated with the expectation of privacy. See *Arkansas* v. *Sanders*, 442 U.S. 752, 762 (1979). Although a paper bag *may* be pressed into service as a repository of personal effects, we do not believe a reasonable man would identify a paper bag as a normal place to entrust his intimate personal possessions. In contrast, luggage in general serves to carry clothes, toiletries, and other items associated with day-to-

> day living. Luggage typically functions as a portable closet and chest of drawers. It follows that a person could justifiably maintain a substantially higher expectation of privacy in his personal luggage than in a paper bag.

The panel concluded (Pet. App. 136a; emphasis in original):

> Because a paper bag's general vulnerability suggests no reasonable expectation of privacy after its seizure * * * and because the police justifiably believed that *this* paper bag was not being used to store personal items, the police lawfully could open it without violating Ross's fourth amendment rights.

3. Acting upon respondent's suggestion, the court of appeals granted rehearing en banc. In an opinion joined by seven of its members, the majority of the court rejected the panel's conclusion that the warrantless search of the unsealed paper bag was permissible (Pet. App. 1a-27a).[2] Although the majority agreed that respondent's car was properly stopped and searched, and the paper bag and leather pouch properly seized, it held that "no 'special exigencies' justified opening the pouch or the bag without a warrant" and that no other "established, well-drawn exception" to the warrant requirement was applicable (Pet. App. 20a, 21a; footnote omitted).

Preliminarily, the court considered (Pet. App. 16a-19a) whether a distinction could be drawn between the situations in *Arkansas* v. *Sanders*, *supra*, and *United*

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[2] On rehearing en banc the government did not challenge the panel's ruling regarding the warrantless search of the leather pouch on its merits. The government did argue that *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), should not have been applied retroactively to the search in issue, and that, for that reason, none of the evidence should have been suppressed. The court of appeals rejected that argument at the outset (Pet. App. 6a-10a), holding *Arkansas* v. *Sanders* applicable retroactively, at least as to searches subsequent to *United States* v. *Chadwick*, 433 U.S. 1 (1977). As is explained in our petition (Pet. 5 n.1) we are doubtful of the soundness of that ruling, but have chosen not to seek further review on that point here.

States v. *Chadwick*, 433 U.S. 1 (1977), where police suspicion amounting to probable cause was focused upon the containers that were searched rather than the vehicles in which they were placed, and the instant case, where the officers' suspicion focused on the vehicle itself rather than any particular parcel contained in it. Reading *Sanders* to disapprove the decision in *United States* v. *Finnegan*, 568 F.2d 937 (1977), in which the Ninth Circuit had drawn such a distinction, the court rejected application of the automobile search exception as a basis for sustaining the search.

The court next considered (Pet. App. 19a-27a) whether the rule of *Chadwick* and *Sanders* might be limited to relatively substantial containers, and thus be inapplicable to respondent's paper lunch bag. Declining to adopt what it termed "an unworthy container rule" (Pet. App. 23a), the court perceived no distinction "between [respondent's zippered leather] pounch and [the paper] bag * * * that makes theoretical or practice sense" (*id.* at 27a). The court of appeals interpreted the footnote in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 765 n.13, which notes limitations on the reach of that decision, as an exhaustive listing of circumstances in which a warrantless search would be permitted, embracing only containers whose contents are in plain view, or whose appearance otherwise serves to disclose their contents (Pet. App. 25a). The court stated its view that an exception based upon the nature of, and the conventional uses associated with, certain classes of containers "would snare those without the means or the sophistication to use worthy containers" and "would destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant" (*id.* at 24a-25a; footnote omitted). The en banc court accordingly concluded that the contents of the paper bag, as well as those of the leather pouch, should have been suppressed (*id.* at 27a).

Four members of the court dissented. Judge Tamm, who had written the panel opinion, adhered to his original reasoning and conclusions (described at pages 3-

5, *supra*) in an opinion (Pet. App. 28a-47a) joined by Judges MacKinnon and Robb, each of whom wrote separately as well (*id.* at 48a-49a, 50a).[3] Judge Wilkey dissented separately (*id.* at 50a-117a) on the ground that *Arkansas* v. *Sanders*, *supra*, should not be applied retroactively to the search at issue (see *id.* at 53a-77a).[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

Just this past Term, in *Robbins* v. *California*, No. 80-148 (July 1, 1981), this Court considered a question closely related to that presented here. The question in *Robbins* was whether, during a lawful warrantless search of an automobile based upon probable cause, police may, consistent with the Fourth Amendment, search sealed packages wrapped in opaque plastic found in the luggage compartment of the vehicle. The Court held the warrantless search unlawful, but there was no majority opinion.

In granting the petition for a writ of certiorari in the instant case, the Court directed the parties to address the

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[3] Stating that reasonableness "*is* the constitutional standard" for determining whether a search is consistent with the Fourth Amendment (Pet. App. 48a-49a; emphasis in original), Judge MacKinnon would have upheld the warrantless search of the leather pouch as well as the paper bag and would accordingly have affirmed the conviction. Judge Robb joined (*id.* at 50a) Judge Tamm's dissent with respect to suppression of the contents of the paper bag. He joined in the judgment requiring suppression of the contents of the pouch reluctantly, deeming that result compelled by this Court's decisions. However, he noted (*ibid.*) his view that

> the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room.

[4] Judge Wilkey would, however, have joined the majority as to the issues on the merits, reluctantly concluding that *Arkansas* v. *Sanders* controls this case (Pet. App. 82a, 95a-99a) but criticizing both the decision in *Sanders* (*id.* at 77a-101a) and the exclusionary rule itself (*id.* at 101a-117a). Judge MacKinnon joined in so much of Judge Wilkey's dissent as addressed the retroactivity issue (*id.* at 48a).

question whether it should reconsider the decision in *Robbins*. For the reasons detailed below, we respectfully submit that the analysis employed by the plurality in *Robbins* is mistaken, and that the Court's holding condemning the warrantless search in *Robbins* was erroneous. Even if the Court adheres to the holding that wrapped and sealed packages that meaningfully conceal their contents may not be searched without a warrant, however, it would not be reasonable to extend such a holding to containers as flimsy as respondent's paper bag.

Our submission that *Robbins* requires reconsideration does not depend alone upon our view of the merits of the question presented here and in that case. Rather, further consideration of the decision in *Robbins* is compelled because the Court there failed to articulate principles governing the search of containers found in the course of a lawful vehicle search in any fashion that commanded the support of a majority of the Justices.[5] In view of the

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[5] Indeed, following announcement of the decision in *Robbins*, one court of appeals pointedly observed: "[W]e have no unequivocal instruction from *Robbins* to guide us in our determination of whether a grocery bag, which the record does not reveal as having been sealed or closed," could be searched without a warrant. *Government of the Virgin Islands* v. *Rasool*, 657 F.2d 582, 592-593 (3d Cir. 1981); see *id.* at 595 (Adams, J., concurring). Other decisions rendered after *Robbins* reflect continuing uncertainty as to the rule to be applied. See, *e.g.*, *United States* v. *Mefford*, 658 F.2d 588 (8th Cir. 1981), ~~slip op. 9~~ (upholding warrantless search of paper bag); *United States* v. *Weber*, Nos. 80-1553 etc. (1st Cir. Sept. 30, 1981), petition for rehearing en banc pending (holding, over a dissent, that warrantless opening of a rolled up rainslicker was impermissible); *Sharpe* v. *United States*, Nos. 79-5314 & 79-5315 (4th Cir. Sept. 4, 1981), petition for rehearing en banc pending (holding, over a dissent, that warrantless search of burlap bags believed to contain marijuana was impermissible); *United States* v. *Rivera*, No. 80-1115 (5th Cir. Sept. 2, 1981), disposition of petition for rehearing stayed pending a decision in the instant case (holding warrantless sampling of opaque plastic trash bags believed to contain marijuana impermissible); cf. *United States* v. *Cleary*, 656 F.2d 1302 (9th Cir. 1981), petition for cert. pending, No. 81-953 (filed Nov. 20, 1981) (holding, over a dissent, that warrantless search of a canvas bag with a broken zipper and a gun butt visible at its mouth was impermissible).

uncertainty left by the decision in *Robbins*, the importance of the question presented for law enforcement purposes, and the Court's "institutional responsibility * * * to harmonize [its] views on [such a] constitutional question[] of broad application" (*Robbins* v. *California*, *supra*, slip op. 8 n.4 (Powell, J., concurring)) we urge the Court to reconsider the decision in *Robbins*.

I

Reduced to its essentials, the view of the *Robbins* plurality and of the majority below was that the Fourth Amendment should be construed to make all warrantless searches of containers, of whatever kind or description, unreasonable per se unless the contents of the container are effectively in plain view, consent is given, or exigent circumstances make it infeasible to secure a warrant. We submit, however, that the general analytic approach advanced by Justice Powell in his concurrence in *Robbins*, under which the need for a warrant is linked to objective factors indicating that the proposed search will invade an area vested with substantial privacy attributes, is more faithful to the policies of the constitutional provision and better serves the interests of individuals as well as of society.

A. Neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a lawful search or seizure. Nevertheless, the provision does require that searches and seizures be reasonable, and this Court over the years has held that various types of searches may not ordinarily be deemed reasonable unless authorized by a warrant issued by a neutral and detached magistrate and satisfying the prerequisites of the Warrant Clause of the Fourth Amendment. The warrant requirement has been applied to homes, offices, hotel rooms, mail, interception of oral communications, and luggage. We have no quarrel here with any of these holdings or with the policy judgments that underlie them. What we do take issue with is the sweeping extension of the warrant requirement embodied in the

court of appeals' holding in this case, which casts Fourth Amendment law adrift from its traditional moorings in reasoned accommodation of individual privacy interests and societal law enforcement interests.

B. It is our submission that the issue whether a search of a container must be supported by a warrant in order to be reasonable under the Fourth Amendment cannot be decided without taking into account the magnitude of the individual privacy interest invaded by the search. The correctness of linking the warrant requirement to the strength of the privacy interests affected by a search is shown by an analysis of the functions served by the warrant in protecting the interests of the individual against unreasonable governmental intrusion. Generally, the procurement of a warrant accomplishes three useful purposes:

1. A warrant serves to limit the scope of a search to those items for which probable cause exists and those areas in which there is reason to believe the items may be located. In the context of a search of a seized container, however, there is no risk of a general or overbroad search, and thus a warrant is not necessary in order to guard against that danger.

2. In at least some contexts, the warrant gives notice to the individual whose premises and effects are to be searched of the existence of authority to conduct the search and of the permissible scope of the search. Again, in the case of a seized container, the scope of the search is not seriously in issue. And little is gained by assuring an individual whose belongings are searched that a search has been judicially authorized when his property has already been lawfully seized without such authorization.

3. For purposes of cases like the present one, the relevant function performed by a warrant is as prophylaxis against the police officer's mistaken judgment that justification exists to undertake the proposed search. No doubt there are occasions when a vigilant magistrate will refuse to authorize a search that an overzealous police officer would undertake if left to his own devices. But

this function of the warrant procedure simply cannot be divorced from consideration of the importance of the privacy interests implicated by a proposed search. An officer who searches a house or taps a telephone without probable cause has intruded unjustifiably into an area to which our society attaches strong privacy interests, causing a grave and largely irreparable injury. If the prophylaxis of a warrant requirement avoids even a relatively small number of unreasonable searches of this nature, the personal security of the citizenry will have been meaningfully advanced. In the context of searches of containers such as respondent's paper bag or Robbins' plastic wrapped parcel, however, the likely benefits of a warrant are drastically reduced, since a mistaken search, far from exposing intimately private matter, will usually disclose nothing more than some items of recently purchased merchandise or the like.

In sum, warrantless searches may be deemed unreasonable to the extent that a mistaken or unjustified search will expose to official view areas or items that traditionally are accorded high privacy value by our society. But as the privacy interests implicated by a particular type of search diminish, so too does the reasonableness of insisting upon resort to the prophylaxis afforded by the warrant procedure.

If we are correct that the applicability of the warrant requirement is in substantial part a function of the magnitude of the privacy interest generally implicated by the type of search to be undertaken, then it is beyond serious dispute that no warrant was required to search respondent's paper bag. A paper bag is a type of container that is only rarely used to transport personal effects of a significantly private character, and that by its nature is poorly designed to shield its contents from disclosure to others, especially if it has come into the possession of a third party.

C. Consideration of the applicability of a warrant requirement to a particular class of searches requires not only an evaluation of the benefits likely to be derived

from such a requirement, but also a weighing of the costs that will thereby be imposed. If, for example, the cost is a substantial risk that evidence will be destroyed (*i.e.*, exigent circumstances), it is universally recognized that the warrant procedure may reasonably be foregone. But even in the absence of exigent circumstances, it is unrealistic to suppose that the warrant procedure is cost-free. At a minimum, it will ordinarily involve several hours of police officers' time to prepare a warrant application and present it to a magistrate—time that could otherwise be spent patroling a beat or performing other law enforcement functions. This cost may be well worth incurring when the proposed search implicates substantial individual privacy interests; it is far harder to justify when such interests are not likely to be at stake.

A warrant requirement for container searches will also often impose costs on the owner of the property to be searched that substantially outweigh the benefits he is likely to derive from resort to the warrant process. Ordinarily, when the police have probable cause to search a container found in an automobile or carried by someone on a public street, they will by the same token have probable cause to arrest the possessor of the container. From the standpoint of the person from whom a container has been seized, particularly one innocent of wrongdoing, it would undeniably seem a lesser intrusion to have the search conducted on the spot than to be arrested and held for several hours while a warrant is sought. It is not a satisfactory answer to say that such an individual may avoid this dilemma by consenting to an immediate search. A police officer is not obliged to accept such a consent, which is after all subject to dispute in a suppression hearing or a tort action, and the officer would indeed be imprudent in doing so whenever a serious crime is under investigation and probable cause appears to be strong.

D. Finally, it has been suggested by the court below and the *Robbins* plurality that a rule requiring warrants for all container searches will provide a valuable "bright

line" test that will help officers in the field to know clearly where their duty lies. We question whether this virtue alone would justify characterizing an otherwise reasonable search as being violative of the Fourth Amendment. But in any event, in this context, the suggestion that broadening the reach of the warrant requirement will in fact provide clear guidance to the officer in the field is unfounded. Rather, the decision below will simply relocate the boundary of uncertainty to such items as open shopping or grocery bags, rolled-up newspapers or clothing, pockets in items of apparel, and the like.

II

The search of respondent's paper bag was also justifiable because it formed an integral part of an otherwise lawful warrantless search of his automobile. The established "automobile search" exception, which serves as the functional equivalent of a warrant to search an automobile, should be construed to authorize searches equal in scope to those permissible under a warrant to search an automobile. As no separate warrant would be required to search a container found in a warrant-authorized search of a car (or a house), no warrant should be required in the circumstances of this case, either. In the setting of this case, recourse to a magistrate for a determination of probable cause to search the respondent's paper bag would have been an essentially sterile exercise, for law enforcement officers had by that time already acted upon their determination that probable cause existed by searching the automobile. Unlike the circumstances considered in *United States* v. *Chadwick*, *supra*, and *Arkansas* v. *Sanders*, *supra*, in this case there was probable cause to search the automobile as a whole. The determination that there was probable cause to search the container was simply a corollary of the earlier conclusion. The conclusion that the contraband sought might lie in the paper bag involved only a rudimentary detective's inference, rather than a judgment concerning the fine points of Fourth Amendment law. Accordingly, recourse to a magistrate at this juncture was not required.

In any event, the imposition of a warrant requirement respecting containers seized from an automobile is logical only when the container involved has substantial privacy attributes which rise above the privacy expectations invested in the automobile itself. Respondent's paper bag, however, had no such qualities. Indeed, an unsealed paper bag cannot reasonably be relied upon to segregate its contents from items lying loose in an automobile and does not convey any expectation of heightened privacy in its contents. The use of such a container renders unreasonable any subjective expectation that privacy will be maintained after it is separated from its owner. Accordingly, no warrant was required to effect the search of respondent's paper bag as part of an otherwise lawful search of the automobile in which it was located.

ARGUMENT

I. A WARRANT IS NOT REQUIRED TO RENDER REASONABLE A PROBABLE CAUSE SEARCH OF A CONTAINER, UNLESS THE CONTAINER IS OF A KIND CONVENTIONALLY REGARDED AS EMBODYING A SUBSTANTIAL PRIVACY INTEREST

While the express language of the Fourth Amendment does not require police to obtain warrants in any circumstances, this Court has relied upon the reasonableness requirement of that provision in holding that "normally searches of private property [must] be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 758.[6] Accordingly, on several recent occasions

[6] As an historical matter, it seems relatively clear that the Fourth Amendment was not designed to ensure or understood to require that searches generally be based upon warrants. The provision was adopted against the background of widespread opposition, both in Great Britain and in the American colonies, to the use of general warrants, which authorized the search of any dwelling and the arrest of any person, without any showing of probable cause. N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 37, 43-44 (1937). In addition, the former colonists reacted to the despised

the Court has held that absent exigent circumstances, consent, or circumstances constituting a proper search incident to arrest, a warrant is required before police may search a particular kind of container, even though they have probable cause to believe that it contains contraband or evidence of a crime, and even though the container is lawfully seized from a motor vehicle. *Robbins* v. *California*, *supra* (securely wrapped and sealed parcel); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762-766 (suitcase); *United States* v. *Chadwick*, *supra*, 433 U.S. at 11-13 (double-locked footlocker). It is our submission, of course, that none of the foregoing cases is controlling here. We also urge that to the extent the plurality opinion in *Robbins* v. *California*, *supra*, extends the holdings of *Chadwick* and *Sanders* (see *Robbins* v. *California*, *supra*, slip op. 1 (Powell, J., concurring)), it should be

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writs of assistance, which were open ended general search warrants permitting royal customs officials to enter any dwelling. *Id.* at 54. The historical record reveals that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." T. Taylor, *Two Studies in Constitutional Interpretation* 41 (1969). Indeed, the original draft of the Fourth Amendment was aimed only at controlling use of overbroad warrants. See 1 Cong. Deb. 783 (Gales & Seaton ed. 1834). A modest change of words responsible for the version which became part of our Constitution crept into the Amendment only by seeming inadvertance. See N. Lasson, *supra*, at 101-102; Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 366 n.30 (1921). The language ultimately adopted, of course, does require that all searches be judged by a standard of reasonableness, but the background suggests that no change was intended in the then-settled rule that not every warrantless search was per se unreasonable. Indeed, as this Court long ago noted (see *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925), a distinction between searches of houses, for which a warrant was required, and searches of goods in transit, which were not so protected, was recognized in the Acts of Congress enacted contemporaneously with the adoption of the Bill of Rights. See Act of July 31, 1789, ch. 5, Section 24, 1 Stat. 43; see also Act of Mar. 3, 1815, ch. 94, Section 2, 3 Stat. 232; Act of July 18, 1866, ch. 201, Section 3, 14 Stat. 178. The 1815 statute authorizing warrantless searches was signed into law by President James Madison, who had proposed the language that ultimately formed the basis for the Fourth Amendment.

reconsidered. Before turning to the particular circumstances of this case, however, we think it appropriate to review the underlying considerations that in our judgment inform this Court's Fourth Amendment decisions.

A. A Warrantless Probable Search Is Reasonable Under The Fourth Amendment When The Social Cost Of Requiring This Additional Procedure Outweighs The Benefits That Would Be Conferred

As noted above, this Court has stated in various contexts that a warrant is presumptively required before a search of private property may be deemed reasonable under the Fourth Amendment. The warrant requirement, however, is not absolute. Exceptions have been recognized "where it was concluded that the public interest required some flexibility in the application of the general rule," particularly where "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759; see also *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967); cf. *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975). Several considerations underlie the recognition that a warrant is not required in certain circumstances. First, the exigencies of the particular situation may make proceeding with a warrantless search imperative. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971). For example, where the police are in hot pursuit of a fleeing criminal, they may enter a private dwelling to search for him as well as for evidence and fruits or instrumentalities of the crime. *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967); see also *Payton* v. *New York*, 445 U.S. 573, 583 (1980).[7] Similarly, when

[7] Although the point is often overlooked, the exigent circumstances exception to the warrant requirement is merely an application of the general balancing test. It is not inherently inconceivable that a warrant be required in such situations; rather, the Court has determined that society's interests in law enforcement outweigh the gains to privacy interests from recourse to the

an arrest is made, it is reasonable for the arresting officer to conduct an immediate search of the person arrested as well as the area within his immediate control in order to remove any weapons that he might use in order to effect his escape, and to seize evidence in order to prevent its concealment or destruction. *Chimel* v. *California*, 395 U.S. 752, 763 (1969). And, for identical reasons, the police may, incident to the arrest of an occupant of an automobile, search the passenger compartment of the vehicle, as well as containers within it, for weapons or contraband. *New York* v. *Belton*, No. 80-328 (July 1, 1981), slip op. 6.

Exigent circumstances also have been cited as one basis for permitting warrantless searches of automobiles stopped by the police along the highway. As the Court explained in *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970), "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." See *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761; *United States* v. *Chadwick*, *supra*, 433 U.S. at 12; *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 460; *Cooper* v. *California*, 386 U.S. 58, 59 (1967); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925).

But the so-called "automobile search" exception does not require a demonstration of exigent circumstances. A second rationale for dispensing with a warrant—the owner's diminished expectation of privacy—supports " 'warrantless searches of vehicles * * * in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent' " (*United States* v. *Chadwick*, *supra*, 433 U.S. at 12, quoting *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973)). As the Court explained in *United States* v. *Chadwick*, *supra*,

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warrant procedure. Accordingly, while probable cause is still ordinarily required, a warrantless search is a reasonable search in those instances.

433 U.S. at 12, quoting *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion):

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository of personal effects * * *. It travels public thoroughfares where both its occupants and its contents are in plain view.

As a result, the owner's privacy interests in the vehicle's interior are thought to be adequately protected by the requirement that any search be supported by probable cause or other reasonable justification—and by allowing the determination of reasonableness to be made in the first instance (subject to later judicial review) by the searching officers. See, *e.g.*, *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 448 (warrantless search of impounded vehicle reasonable because necessary to recover firearm); *Chambers* v. *Maroney*, *supra*, 399 U.S. at 52 (warrantless search of automobile at police station reasonable because based upon probable cause). Such privacy interests are deemed insufficiently substantial to necessitate the added protections secured by the warrant procedure. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 13.[8]

In holding that the opening of the paper bag found in the trunk of respondent's car violated the Fourth

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[8] Reduced expectations of privacy also justify warrantless administrative searches of pervasively regulated businesses. See *Donovan* v. *Dewey*, No. 80-901 (June 17, 1981); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 74, 77 (1970). Just last Term in *Donovan* v. *Dewey*, *supra*, slip op. 4, the Court recognized that the warrant requirement is not to be applied in an indiscriminate fashion to all property, irrespective of its character, stressing that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home * * *." Moreover, in explaining the "pervasively regulated businesses" exception to the warrant requirement, the Court noted (slip op. 5-6) that persons operating such businesses are necessarily aware of the possibility of inspection, and their justifiable expectations of privacy are accordingly limited.

Amendment, the court below concluded that none of the recognized exceptions to the warrant requirement was applicable here (Pet. App. 21a). The court of appeals further declined to "delineate a new" exception applicable in the circumstances of this case (*id.* at 23a-27a). It is our contention, however, that the policies which underlie the established exceptions to the warrant requirement lead to the conclusion that the presence of a warrant is not necessary to establish reasonableness, under the Fourth Amendment, of a search of a paper bag or other insubstantial container that has been lawfully seized based upon probable cause to believe that it contains contraband or evidence of a crime. See *South Dakota* v. *Opperman*, 428 U.S. 364, 382-383 (1976) (Powell, J., concurring).

The issue in this case, as in any case involving the applicability of the warrant requirement, is not the level of justification that is required to support a governmental search of private property or personal effects. If, in order to be reasonable, a search must be supported by probable cause to believe that it will uncover contraband or evidence of a crime, that justification depends upon the facts known to the officer, and it is not increased or diminished by the action of the magistrate in response to a warrant application. The warrant is thus a procedural protection that does not affect the substantive justification for the search. Moreover, the question in any warrant case is not whether the justification for a proposed search or seizure shall be subject to judicial review, but simply the timing of that review. The foregoing is not meant to denigrate the importance and utility of the warrant procedure as a protection against unjustified searches and seizures in many contexts. A search that implicates substantial privacy interests ought not be undertaken without the benefit of reasonable procedural protections for the individual interests involved. But the warrant procedure is not cost-free, and as the advantages it offers diminish, so too does the basis for labeling a substantively justified search unreasonable because of a failure to utilize the warrant procedure.

The Court has previously recognized that exceptions to the warrant requirement are to be fashioned when "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759. In striking that balance we suggest as a model for analysis the test employed to determine whether particular procedural safeguards satisfy the requirements of due process—an inquiry that has a nature and purpose substantially similar to the inquiry into the desirability of the warrant procedure to protect individual Fourth Amendment interests. As stated in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), consideration of three factors is required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail.

In order to strike this balance it is necessary first to appreciate the interests that are ordinarily served by requiring that a warrant be obtained.

B. The Marginal Benefit Of Requiring That A Warrant Be Secured Prior To Search Of A Low-Privacy Container Lawfully Seized By Police Is Outweighed By The Costs To Society, And To The Individual Whose Belongings Are Seized, Of Requiring This Procedure

1. Traditionally, three basic functions have been ascribed to the requirement that a warrant be obtained prior to undertaking a search of private property. First, as explained by Justice Jackson for the Court in *Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (footnote omitted):

> Its protection consists in requiring that * * * inferences [from evidence relied upon to establish prob-

> able cause for a search] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Second, it is thought that a warrant tends to limit the scope of the search to bounds commensurate with the probable cause underlying its issuance. *United States* v. *Chadwick*, *supra*, 433 U.S. at 9. Third, the presence of a warrant serves to assure persons subjected to a search "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U.S. at 9; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 532.

As Judge Wilkey explained in his dissenting opinion below the policies ordinarily furthered by the warrant requirement, for instance in the search of a home, have little if any application to the search of a container lawfully seized upon probable cause in a warrantless search of an automobile (Pet. App. 83a-85a; footnotes omitted; emphasis in original):

> When a *container* is seized from an *automobile* after a lawful warrantless search of a car, however, these advantages largely evaporate. First, in the event a warrant does not issue for the containers seized, the level of intrusion is reduced modestly, if at all. The car's occupants already have been stopped, detained and deprived of control over the seized container. In all likelihood, they also have been arrested, for in most cases probable cause to search for contraband will also provide probable cause to arrest its possessors. Should they be arrested, the car's occupants will in addition be subject to searches of their persons and of the area within grabbing distance of them. At this point, if a warrant fails to issue, the additional intrusion they have been spared is surely minimal compared with that which has gone before. By contrast, when a warrant does not issue for the search of a dwelling, the householder is spared even knowledge of the proposed search.

A warrant requirement for containers, moreover, does not define the area to be searched and the objects to be seized; the car has already been searched and the containers seized by the time the warrant issues. Just as obviously, the warrant requirement for searches of containers found in a car does not serve the function of reassuring the occupants of the officer's lawful purpose and authority. After they have been stopped, searched, deprived of control over their property, and taken to the police station, the moment for reassuring the car's occupants of the lawful purpose of the police long since will have passed.

A warrant requirement for *containers* thus provides only a small fraction of the protection assured by the warrant requirement for *dwellings*. How little is left is demonstrated by considering what value a warrant would be if the same rules applied to the search of houses as to the search of cars. Were the warrant requirement for houses to parallel that for cars, officers with probable cause would be authorized to enter a house without producing a warrant, to range free throughout the house while examining its contents, to open cupboards, closets and anything else immovable, then to scoop up any suspicious containers for removal to the stationhouse, probably with the householder himself in tow. After considerable delay, the officers would then triumphantly present the startled householder with a warrant authorizing the opening of the containers seized. Innocent householders could be expected to consider this belated appearance of a warrant a nearly useless afterthought. It is hard to see why drivers and passengers should react otherwise.

See also *South Dakota* v. *Opperman*, 428 U.S. 364, 382-384 (1976) (Powell, J., concurring).

These observations are fully applicable to any situation in which a container has been seized without a warrant on the basis of an officer's determination that probable cause exists. The only interest advanced by requiring recourse to a magistrate in such cases is pro-

tection against misjudgments by overzealous officers regarding the existence of a reasonable basis in the available facts to justify the search.[9] In some proportion of cases, the interposition of a neutral and detached judicial officer will serve to prevent an unjustified intrusion.[10] Where the proposed search is of items or areas generally recognized as enjoying substantial privacy attributes, it is reasonable to insist upon a warrant because of the social judgment that the costs of an unjustified search of such a high privacy area are unacceptable. The prophylaxis provided by the warrant requirement, even if only a relatively small number of unreasonable searches are thereby avoided, is deemed of sufficient value to justify the conclusion that warrantless searches are unreasonable in such circumstances.

The decisions in *Chadwick* and *Sanders* are entirely consistent with this understanding of the relationship of the warrant requirement to the reasonableness criterion of the Fourth Amendment. Sufficiently strong individual privacy interests were thought to be associated with luggage[11] that an important purpose was served by the warrant procedure in guarding against inadequately justified searches. This justification loses its force, however, when transposed to the context of paper lunch bags such as that seized from the trunk

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[9] As Justice Rehnquist observed in his dissent in *Robbins*, *supra* (slip op. 3), the premise that the warrant requirement provides consistent and meaningful protection to persons whose property may be subject to search is itself open to question. This Court has not interpreted the Fourth Amendment to require that warrants be issued by a lawyer or a judge (see *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972)), and it has acknowledged that the presence of a warrant secured from a magistrate after a hearing does not necessarily "suffice to discourage lawless or reckless misconduct" by police. *Franks* v. *Delaware*, 438 U.S. 154, 169 (1978).

[10] As noted by Judge Wilkey, the incremental value of that safeguard following a seizure of the property is limited.

[11] Luggage was described in *Sanders* as "a common repository for one's personal effects, and therefore * * * inevitably associated with the expectation of privacy" (442 U.S. at 762).

of respondent's car, or even the plastic-wrapped parcel in *Robbins*. As we explain below (pages 29-31) such containers support only a limited expectation of privacy. The costs to Fourth Amendment interests associated with an officer's mistaken assessment of probable cause as to such a container are accordingly substantially less than those associated with an unreasonable intrusion into a home or even into luggage or some other conventional repository of personal effects. For example, if the officer in this case had erred in his judgment that the small paper lunch bag in the trunk of respondent's automobile contained illicit drugs, the likely result is that he would have discovered that it contained recently purchased merchandise or perhaps respondent's next meal.[12] Although it is not to be doubted that the owner has some privacy interest in even these items, it is equally apparent that this interest is simply not comparable to that which attaches to the contents of homes, offices, private communications, or even luggage, and which has prompted the Court to extend to all of those areas the protections of the warrant procedure.

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[12] In *Robbins* v. *California*, *supra*, the plurality noted (slip op. 7-8 n.2) the comments of the dissenting judge in the California Court of Appeal respecting the container there at issue:

> For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I brought from a store and have carried in the trunk of my own automobile.

People v. *Robbins*, 103 Cal. App. 3d 34, 44, 162 Cal. Rptr. 780, 785 (1980) (Rattigan, J., dissenting). These comments were offered to show that the exterior of the package in question did not, contrary to the view of the California court majority, reveal its contents. However, they serve even more tellingly to demonstrate that if the California patrolman's judgment that marijuana was inside the package had proven unfounded, Mr. Robbins would not have suffered the kind of intrusion into highly private possessions for which the prophylactic requirement of advance judicial authorization is really valuable.

2. On the other hand, the cost of requiring procurement of a warrant to achieve the marginal benefits of minimizing these limited intrusions would be inordinately high. As Justice Powell explained in his concurring opinion in *Robbins* (slip op. 5):

> Confronted with a cigar box or a Dixie cup in the course of a probable cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values.

Affording the limited privacy interest in the contents of a paper bag (or other containers not "inevitably associated" with substantial privacy values) the added protection of the warrant procedures does not, we submit, justify removing a police officer from other duties while he or she engages in the frequently lengthy and burdensome task of securing a warrant.

Equally important, the warrant requirement threatens injury to other Fourth Amendment interests of the owners of such parcels. As Judge Wilkey noted in his dissent (Pet. App. 91a-92a), the officer's belief that probable cause exists to seize and search a container found in someone's possession in an automobile or a public place usually also gives rise to probable cause to arrest the possessor of the container. For the innocent person whose bag or parcel does not in fact contain contraband or evidence of a crime, the injury to Fourth

Amendment liberty interests entailed in a custodial arrest while a warrant is sought would ordinarily be considerably more serious than the injury arising from an immediate warrantless search, which may result in prompt exoneration of the individual, a speedy return of his property, and the freedom to proceed about his business forthwith.[13]

In *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764 n.12, the Court suggested that, whenever the owners of containers suspected of containing contraband find unac-

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[13] The universe of cases in which an officer has seized a container believing he has probable cause to do so and intending to search it may be usefully divided into four categories:

(1) The officer is correct in his belief that probable cause exists, and in fact the container has in it contraband or evidence of a crime. In such a case, while an immediate warrantless search would not avoid arrest and incarceration, the failure to obtain a warrant has turned out to be harmless.

(2) The officer is correct in his belief that probable cause exists (so that a warrant would issue if one were sought), but the contents of the container were in fact innocent. In this case, too, the failure to procure a warrant is harmless, since the search would occur in any event, but the warrant procedure will have caused a serious added and unnecessary burden for the suspect.

(3) The officer is mistaken in his belief that probable cause exists, but the magistrate makes the same error. In this situation recourse to the warrant procedure will have failed to afford protection to the suspect's privacy interests, while still exacting a substantial cost from the detention while the warrant is procured.

(4) The officer is mistaken in his belief that probable cause exists, and the magistrate refuses to authorize a search of the seized container. Only in this class of cases (the incidence of which is speculative) will the warrant procedure have performed a useful function in protecting Fourth Amendment interests. Even here, however, the extent of the injury suffered by an immediate unjustified search will usually be slight in the case of low-privacy containers, so that the protection afforded by the warrant procedure will often prove unwelcome to the individual whose property and perhaps person have been detained while the warrant was sought.

ceptable the inconvenience of detention while the police obtain a search warrant, the inconvenience may be avoided by simply consenting to a search. While this appears at first blush to be a satisfactory response to the concern that a warrant requirement may substantially burden the interest of suspects (especially innocent ones) in freedom from a possibly lengthy period of arrest while a warrant is sought, closer analysis discloses serious problems. Because the suspect who consents to a search waives constitutional protections guaranteed by the Fourth Amendment, the consent must be given freely and voluntarily. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973). The question whether a consent to search was voluntary or was the product of duress "is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Factors that are pertinent to this determination include not only the conduct of the police—whether the suspect was threatened, placed in custody, and/or advised of his right to refuse to consent—but may also include some factors that are not necessarily apparent to the officer—including the suspect's knowledge of his right to refuse, his age, intelligence, education, and state intoxication. See, *e.g.*, *id.* at 226 (relevance of lack of education and low intelligence); *United States* v. *Mendenhall*, 446 U.S. 544, (558-559 (1980) (opinion of Stewart, J.) (knowledge of right to refuse is "highly relevant" to determination of consent; suspect's race and education also relevant factors). Ironically, special difficulties in judging the voluntariness of consent may be created by the incentive to consent in cases such as this: *i.e.*, that the alternative to giving consent is the inconvenience and stigma (especially for the innocent persons) associated with arrest, booking, and incarceration (see Pet. App. 93a).

A police officer is under no obligation to proceed with an immediate search simply because the suspect has consented to it. In view of the difficulty of determining on the spot whether consent is voluntarily given in the constitutional sense and the risk that even a consent that is in fact

voluntary will not be found to have been so at a subsequent judicial hearing, it is risky law enforcement practice to rely upon a putative consent that may later be found invalid, thereby rendering the search unlawful even though supported by probable cause. Thus, absent exigent reasons for proceeding upon a consent (which, of course, would themselves obviate the need for a warrant) consent will frequently prove to be an illusory alternative to the substantial intrusion of arrest. In any event, law enforcement officers should not be required to rely upon consent as the sole basis for warrantless searches of insubstantial containers that have been lawfully seized.

Given the available alternatives, an immediate search of a seized container based upon the officer's own assessment of probable cause would usually constitute a lesser intrusion on the owner's privacy interests than arrest and detention pending application for a search warrant. See *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51-52. The costs of requiring a warrant to search containers which do not exhibit substantial privacy expectations are accordingly disproportionate to whatever incremental privacy protection might be achieved by imposition of such a requirement. For purposes of protecting the residual privacy interest that does attach to the contents of paper bags and similar containers, it is sufficient that such searches must be based upon the police officer's possession of probable cause, and that his determination of that question is subject to full post-search judicial scrutiny.[14]

We recognize that the choice between detention and an immediate search is not squarely presented where there are independent grounds for arresting an individual apart from the suspected contents of the con-

[14] Here, of course, it is undisputed that the search was supported by probable cause (see Pet. App. 19a-20a n.22). When reasonable justification for a search was lacking at the outset, a civil damages remedy may be available. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

tainer.[15] The rule, however, should be based upon the general nature of the situations it covers. Moreover, as is explained above (pages 21-23, *supra*), a warrant serves its usual functions weakly, if at all, whenever the owner of a seized container has been arrested. In such circumstances, not only has the owner's automobile been stopped and searched, and the container seized, but the owner and the entire passenger compartment of the automobile and any container found therein may be searched without a warrant as an incident to the arrest. See *New York* v. *Belton*, *supra*, slip op. 6-8; *United States* v. *Robinson*, 414 U.S. 218 (1973); *Chimel* v. *California*, 395 U.S. 752 (1969). Moreover, an inventory search of the respondent's automobile would have been permissible, so long as it was undertaken pursuant to uniform police practices and was not a pretext for an investigatory search. *South Dakota* v. *Opperman*, 428 U.S. 364, 376 (1976). Accordingly, when independent grounds for an arrest exist, the additional intrusion effected by the search of the container is especially modest. When the container in question does not support substantial privacy expectations capable of surviving separation from its owner, the policies of the Fourth Amendment are little, if at all, advanced by imposition of a warrant requirement.

C. Most Bags And Parcels Cannot Support A Justifiable Expectation Of A Substantial Degree Of Privacy

In *United States* v. *Chadwick*, *supra*, 433 U.S. at 12-13, the Court recognized that the "automobile exception" to the warrant requirement rests in part upon the lower expectation of privacy attached to a motor vehicle, as compared to homes and offices. Similarly, in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761, the Court noted that the

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[15] Respondent was arrested upon discovery of a gun and ammunition. He was charged with weapons law violations under District of Columbia and federal law (D.C. Code Ann. § 22-3204 (1973); 18 U.S.C. App. 1202(a); see Pet. App. 6a, 123a) but was not convicted on these counts.

"automobile exception" rests in part upon "the configuration, use, and regulation of automobiles [which] often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." In each case, however, the Court declined to extend the automobile exception to the luggage involved, or to fashion a comparable exception applicable to such containers, stressing that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762, citing *United States* v. *Chadwick*, *supra*, 433 U.S. at 13.

On the other hand, the Court made it clear in *Sanders*, (442 U.S. at 764 n.13) that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment," offering by way of example

> containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. * * * There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched * * *.

Id. at 764-765 n.13.[16] The Court's caveat left the status of containers other than personal luggage "hanging in

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[16] Both the court below (see Pet. App. 25a) and the plurality in *Robbins* (slip op. 6-7) concluded that the exceptions listed by the Court in *Sanders*—containers whose contents are in plain view and those whose contents are inferrable from their outward appearance—constituted an exhaustive listing of exceptions to the warrant requirement, rather than merely examples. To say the least, that seems a strained interpretation of the Court's language in *Sanders*. If the listing in *Sanders* were intended to be all-encompassing it would hardly follow that "[t]here will be difficulties in determining which parcels taken from an automobile

limbo" (*id.* at 768 (Blackmun, J., dissenting)). Prior to this Court's decision in *Robbins*, the lower courts had shouldered the task of determining which kinds of containers and packages activate the warrant requirement of the Fourth Amendment. Invalidation of warrantless probable cause searches was generally reserved for searches of containers that normally function as repositories for personal effects or papers, or that represent the functional equivalent of luggage, such as suitcases, briefcases, purses, duffle bags, knapsacks, and gym bags.[17] With the exception of the decision by the court below sitting en banc, however, and the decision in *United States* v. *Moschetta*, 646 F.2d 995, 958-959 (5th Cir. 1981), petition for cert. pending *sub nom. United States* v. *Spieler*, No. 81-908 (filed Nov. 13, 1981) which relies directly upon the opinion in the instant case, the courts of appeals generally declined, prior to *Robbins*, to extend the warrant requirement to paper and plastic bags and packages.[18] As

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require a warrant for their search * * *," or that "[o]ur decision in this case means only that a warrant generally is required before personal luggage can be searched * * *." *Arkansas* v. *Sanders*, 442 U.S. at 765 n.13.

[17] See, *e.g.*, *United States* v. *Presler*, 610 F.2d 1206 (4th Cir. 1979) (briefcases); *United States* v. *Miller*, 608 F.2d 1089 (5th Cir. 1979) (portfolio); *United States* v. *Montano*, 613 F.2d 147 (6th Cir. 1980) (suitcase); *United States* v. *Meier*, 602 F.2d 253 (10th Cir. 1979) (knapsack). The panel opinion in the instant case collects other, similar decisions (Pet. App. 129a n.3).

[18] In addition to the panel opinion in the instant case, see *United States* v. *Foskey*, 636 F.2d 517 (D.C. Cir. 1980) (paper bag); *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) (plastic and paper bags); *United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) (plastic bag); *United States* v. *Markland*, 635 F.2d 174 (2d Cir. 1980), cert. denied, No. 80-6454 (May 18, 1981) (beverage bag); *United States* v. *Delos-Rios*, 642 F.2d 42, 46 (2d Cir.), cert. denied, No. 80-6420 (Apr. 27, 1981) (paper bag); *United States* v. *Bush*, 647 F.2d 357, 370-371 (3d Cir. 1981) (cardboard box); *United States* v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) (pharmacy bag); *United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) (closed paper bag); *United States* v. *Jimenez*, 626 F.2d 39 (7th Cir. 1980) (paper bag); *United States* v. *Mackey*, 626 F.2d 684

is indicated above (see page 8 note 5), subsequent to *Robbins* the courts of appeals have generally continued to draw this distinction, except where they have deemed it to be foreclosed by *Robbins* itself. See, *e.g.*, *United States* v. *Weber*, Nos. 80-1533, *et al.* (1st Cir. Sept. 30, 1981), slip op. 16-17, petition for rehearing en banc pending; *Sharpe* v. *United States*, Nos. 79-5314 & 79-5315 (4th Cir. Sept. 4, 1981), slip op. 12, petition for rehearing en banc pending; cf. *United States* v. *Cleary*, 656 F.2d 1302, 1306 n.9 (9th Cir. 1981), petition for cert. pending, No. 81-953 (filed Nov. 20, 1981).

The line drawn by the courts of appeals responds not only to the language of *Sanders* but to the factors that have traditionally been employed to determine the scope of Fourth Amendment protection: the precautions taken to preserve privacy, the manner in which the interested individual has employed the object or location to be searched, and applicable property rights insofar as they also reflect widely-shared privacy expectations. See *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring). Particularly significant has been the individual's interest or lack of interest in assuring privacy, as evidenced by the "configuration [and] use" of the container involved, a fundamental basis for the automobile exception. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761. Just as an automobile operated on public roads must, as a practical matter, be deemed subject to a degree of official and unofficial scrutiny quite different from that affecting a home or office (*Chambers* v. *Maroney*, *supra*, 399 U.S. at 48; *Carroll* v. *United States*, *supra*, 267 U.S. at 153), a paper bag or similar container lacks the integrity, privacy and security attributes of luggage that explain the results in *Chadwick* and *Sanders*. See 442 U.S. at 764.

(9th Cir. 1980) (same); *United States* v. *Honigman*, 633 F.2d 1336 (9th Cir. 1980) (same); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979) (plastic bags of marijuana); but cf. *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), adhered to on rehearing, 615 F.2d 10 (1980) (securely taped and carefully concealed cardboard boxes).

The very nature of a container such as respondent's paper bag is incompatible with maintenance of a reasonable expectation that its contents will be cloaked from public exposure, especially once it has left its owner's hands. As Judge Tamm noted in his dissent below (Pet. App. 41a-42a):

> [P]aper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands.

This analysis, which has been widely employed by the courts of appeals (see, *e.g.*, *Government of the Virgin Islands* v. *Rasool*, *supra*, 657 F.2d at 591; *United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980); *United States* v. *Mannino*, 635 F.2d 110, 114 (2d Cir. 1980); *United States* v. *Honigman*, 633 F.2d 1336, 1338 (9th Cir. 1980); see also 2 W. La Fave, *Search and Seizure* § 5.5, at 365 (1978)), properly focuses attention upon the level of privacy that may reasonably be expected *after the container has been separated from its owner*—*i.e.*, when, as here, a lawful seizure of the container has occurred. For it is only if a reasonable expectation of privacy survives such a seizure that the incremental protection offered by the warrant procedure will have meaningful application.[19]

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[19] Thus we note that the question is not, as some courts have stated (see, *e.g.*, *United States* v. *Cleary*, *supra*, 656 F.2d at 1305; see also *Robbins* v. *California*, *supra*, slip op. 5-6 (plurality opinion)), whether the individual has *any* expectation of privacy in the item to be searched. We do not contend that a random search of respondent's container, based on no articulable suspicion, would be permissible. In fact the search here was based upon probable cause and subject to post-search judicial scrutiny. The question

The en banc court of appeals held that the proper police procedure in this case would have been to remove the unsealed paper bag and the leather pouch from the trunk of respondent's automobile to "carry them unopened to a magistrate" (Pet. App. 22a). The very act of gathering up an unsealed flimsy container, however, will frequently reveal its contents to an officer's senses or cause spillage that will lead to the same result. The contents of an open paper bag may be seen, simply by holding the bag in a particular manner. A paper bag like respondent's, which is folded or crumpled at the top but not sealed, may well come open simply by the passage of time—a process which is expedited by handling, however careful. Other pertinent examples can be gleaned from the decisions of the courts of appeals that have accumulated in the wake of *Chadwick* and *Sanders*. For instance, in *Barger* v. *United States*, No. 80-5130 (6th Cir. Apr. 28, 1981), cert. denied, No. 80-6914 (Oct. 5, 1981), the container was an unsealed pillowcase, which contained stolen silverware. If held from the bottom the pillowcase was likely to disclose its contents to the touch. If held from the top, it might well disclose its contents to the sight. And in *United States* v. *Weber*, *supra*, police seized a rolled up rainslicker containing a walkie-talkie, which could well have fallen out in normal handling or have been perceptible to the touch. Whether or not the contents of such containers come into "plain view" is purely a matter of accident.

Having taken none of the precautions which are socially recognized as manifesting a reasonable and realistic expectation that privacy will be maintained, the owners of such containers are no more entitled to claim the benefit of the warrant procedure than the owners of containers whose "contents can be inferred from their out-

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here is simply whether any expectation of privacy whatsoever, however limited, should be deemed sufficient to mandate imposition of a warrant requirement in addition to the fundamental requirement that the search rest upon probable cause. Of course, where there is no expectation of privacy whatsoever, there is no search, and thus no intrusion subject to the Fourth Amendment *vel non*.

ward appearance" or which are "open to 'plain view,' thereby obviating the need for a warrant." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 765 n.13; *Harris* v. *United States*, 390 U.S. 234, 236 (1968). Indeed, unless this is so, a police officer may be required to take special pains not to learn what his or her senses might otherwise discern from normal handling of such a container, lest the issue arise whether the disclosure of its contents through handling was inadvertent or manipulated, unavoidable or avoidable.[20]

Indeed, even before they have been separated from their owners, paper bags and similar containers, unlike luggage and other secure containers, are not "inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, citing *United States* v. *Chadwick*, *supra*, 433 U.S. at 13. Suitcases and similar items typically function as portable closets and chests of drawers; they serve as repositories for clothing toiletries, personal or business records, and the most intimate items associated with daily living. The same, however, cannot be said of paper lunch and grocery bags or even a plastic-wrapped parcel such as was at issue in *Robbins*. The intended and typical function of these containers is simply to facilitate the movement of merchandise, or to contain bulk items. In view of this functional distinction and the scant protection afforded personal effects, "a reasonable man would [not] identify a paper bag as

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[20] Yet another example of such a container is provided by *United States* v. *Cleary*, *supra*. There, an open canvas bag with a broken zipper was seized, based upon probable cause, in the course of a warrantless search of a motor vehicle. The butt of a handgun was visibly protruding from the bag. The gun was removed by police at the scene of the search of the van, unloaded, and replaced in the bag. The bag was then taken to a nearby police station, at which time the gun was again removed. In removing the gun the second time some newspaper in the bag was shifted, thereby revealing a stack of counterfeit currency. In our view, the placement of the gun at the mouth of the bag rendered unreasonable any expectation that, once the bag had been seized, police would not remove the weapon and thereby discover what lay underneath.

a normal place to entrust his intimate personal possessions" (Pet. App. 42a) (Tamm, J., dissenting). Thus, the *Chadwick* Court's reasoning distinguishing, for purposes of the warrant requirement, automobiles from dwelling places is equally applicable to paper bags and other insubstantial packages: "One has a lesser expectation of privacy in [a paper bag] because its function is transportation [of merchandise or bulk items] and it seldom serves as * * * the repository of personal effects * * *." 433 U.S. at 12, quoting *Cardwell* v. *Lewis*, *supra*, 417 U.S. at 590. Accordingly, the considerations which underlie the "automobile exception" to the warrant requirement are equally applicable to respondent's paper bag or Robbins' parcel.

The court of appeals rejected this conclusion, however, suggesting that what it termed an "unworthy container rule" would ensnare those without the means or sophistication to store or transport their personal effects in commonly accepted forms of luggage (Pet. App. 24a). We recognize, of course, that a common grocery bag or a similar container may at times be pressed into service as a repository for personal effects. But the theoretical possibility of such atypical use, without more, does not justify treating all such containers as though they were luggage or other more conventional repositories of private effects, for unrepresentative use is not part of the conventional "understandings that are recognized and permitted by society," which are the touchstone for assessing the scope of the Fourth Amendment protection. *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12; see *Robbins* v. *California*, *supra*, slip op. 6 n.3 (Powell, J., concurring); *United States* v. *Goshorn*, *supra*, 628 F.2d at 700 (mere possibility that bag will be used as luggage does not lead to the conclusion that such containers are inevitably or even ordinarily associated with an expectation of privacy). For example, it does not follow that simply because some people choose to live in an automobile, searches of automobiles generally must be made subject to a warrant requirement. Indeed, in

Cardwell v. *Lewis*, *supra*, 417 U.S. at 590, the Court recognized that "because its function is transportation," the mere possibility of use of a motor vehicle as a residence did not alter the limited expectation of privacy in its interior for purposes of application of the Fourth Amendment.[21]

D. The Imposition Of A Warrant Requirement For All "Container" Searches Cannot Be Justified On The Ground That It Will Provide A Clear "Bright Line" Rule

In rejecting the argument that, for purposes of determining whether a warrant is indispensable to a "rea-

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[21] This case does not present the question whether, by reason of its particular features, its appearance, its surroundings, the conduct of the person claiming Fourth Amendment protection, or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily employed for low-privacy uses as to render a warrantless search of the particular container unreasonable. See *United States* v. *Markland*, *supra*, 635 F.2d at 177; see also Pet. App. 42a-43a nn.5 & 6 (Tamm, J., dissenting). It may be, for instance, that the markings or appearance of a parcel make it apparent that it is destined for dispatch by mail—a status that activates the protection of the Warrant Clause. See *Ex parte Jackson*, 96 U.S. 727, 733 (1878). Or the construction of the container, the precautions taken to secrete it, or its markings may demonstrate that the owner desires and expects to retain a high degree of privacy with respect to its contents. See *United States* v. *Dien*, *supra*, 609 F.2d at 1044-1045 (defendant manifested an expectation of privacy by securely taping cardboard boxes and secreting them behind a plywood barrier). Finally, in some cases, the owner's circumstances or his surroundings might make it apparent that a paper bag or similar container is a repository for personal effects. Where these or other similar objective factors that give notice of a special expectation of privacy attached to a paper bag or its equivalent are present, and that expectation is reasonable in light of the physical attributes of the container, a warrant could perhaps reasonably be justified as a precondition to a search. Absent such circumstances, however, an owner's subjective expectation of privacy (and there is no showing here that respondent had any such subjective expectation) should be insufficient to trigger the warrant requirement. See *Katz* v. *United States*, 389 U.S. 347, 360-362 (1967) (Harlan, J., concurring).

sonable" search, there is a distinction between luggage or comparable repositories for personal effects and less substantial containers, both the court below and the plurality in *Robbins* suggested that recognition of such differences would impose a serious burden upon courts and law enforcement officials by requiring them to make judgments as to which containers could be searched without a warrant. See Pet. App. 4a, 23a-25a; *Robbins* v. *California*, *supra*, slip op. 6 (plurality opinion). On the other hand, the inflexible requirement that a warrant be secured to authorize the search of any container whose contents were not in plain view was deemed to constitute an easily understood and administered guide for the police and accordingly to be preferable to a standard based upon the expectation of privacy associated with the container at issue.

To be sure, there are in many contexts advantages to adoption of "bright line" tests that are easily understood and administered by police officers, who frequently lack training in the subtleties of Fourth Amendment law. But laudable as the effort to formulate a "bright line" standard for the guidance of law enforcement officials might be, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment" or abandonment of analysis from the perspective of its policies. *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978). Just as adoption of a simplistic approach granting police broad authority to conduct certain classes of warrantless searches may inpermissibly sacrifice Fourth Amendment protections (*ibid.*), the adoption of an overly broad warrant requirement, designed by its simplicity to foster such protections, will hinder legitimate law enforcement functions by proscribing activities that do not in fact contravene the Amendment's strictures. Thus, in the instant case, the substitution by the court below of a simplified "bright line" test for a standard giving due account to respondent's limited Fourth Amendment privacy interests in his paper bag has produced a rule that is unsupported

by the policy that underlies the Fourth Amendment: the protection of legitimate privacy interests. Like any such bright line rule, the rule announced by the court of appeals has real costs. See *Robbins* v. *California*, *supra*, slip op. 3 (Powell, J., concurring). For the reasons previously explained, the costs of requiring a warrant in cases such as the instant one are disproportionate to the marginal benefits involved.

Moreover, as Justice Rehnquist observed in his dissent in *Robbins* (slip op. 7):

> [A]ny search for "bright lines" * * * is * * * illusory. Our entire profession is trained to attack "bright lines" the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the "functional equivalent" of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.

The accuracy of this prediction is revealed by decisions rendered subsequent to *Robbins* (see note 5, *supra*). For instance, although the *Robbins* plurality's analysis would eliminate any uncertainty attendant upon consideration of the privacy expectations attaching to a container, it simply substitutes new uncertainty as to what constitutes a "container" within its intendment. In *New York* v. *Belton*, *supra*, decided the same day as *Robbins*, the term "container" was used to "denote[] any object capable of holding another object * * * includ[ing] closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *Belton*, *supra*, slip op. 6 n.4. Invoking that broad definition, one court of appeals has held that a rolled up raincoat constitutes a container for purposes of applying the warrant requirement imposed by the *Robbins* plurality opinion. *United States* v. *Weber*, *supra*, slip op. 16-17. A dissenting judge protested that the broad definition of containers applicable to searches incident to arrest that was fashioned in *Belton*, which has the effect of limiting the need to obtain a warrant, should not be applied to

increase the need for warrants in investigative searches of objects found in automobiles, noting that the court's decision would extend the warrant requirement to encompass "blankets, newspapers or other objects which may be used to hold other things" as well. See *United States* v. *Weber*, *supra*, slip op. 21-22 (Coffin, C.J., dissenting).

In any event, we do not believe that substantial practical difficulties in law enforcement will result from adoption of a standard that initially requires case by case delineation of the types of containers possesing high enough privacy attributes to justify insistence upon a warrant. As Justice Powell explained in his concurring opinion in *Robbins* (slip op. 6 n.3), "[m]any containers, such as personal luggage, are 'inevitably associated with the expectation of privacy,' *Arkansas* v. *Sanders*, *supra*, at 762. Many others, varying from a plastic cup to the ubiquitous brown paper grocery sack, consistently lack such an association." In yet other instances, the owner may so manifest his expectation of privacy in a container ordinarily employed for non-private use by his efforts to mark, wrap, seal, or secrete it that law enforcement officials are placed on notice that they should procure a warrant before conducting a search. In any event, all but a relatively small area of uncertainty is likely to be clarified by judicial decisions, which, as previously noted (pages 31-32 & notes 17 & 18, *supra*), had established a relatively clear and consistent pattern until new uncertainties were introduced by the decision below and that in *Robbins*.[22]

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[22] As Justice Powell noted in *Robbins* (slip op. 6 n.3), in borderline cases, when the character of the container is ambiguous and does not lend itself to a ready determination of the owner's privacy expectation respecting its contents, a prudent officer should "err on the side of respecting ambiguous assertions of privacy" by obtaining a warrant. When confronted with a claim that such an ambiguous container was unlawfully searched without procurement of a warrant, the proper course is for the court to conduct a hearing to determine whether the defendant had manifested a reasonable privacy expectation with respect to its contents. "Relevant to such an inquiry should be the size, shape, material, and condition of the

Should the Court conclude, however, that the nature of a container and surrounding circumstances which reflect the possessor's expectations of privacy therein do not supply a workable rule for determining whether a warrant is required, there exists an established "bright line" rule—the "automobile exception" to the warrant requirement—that can serve as a satisfactory guide to police conduct without doing violence to the reasoned balance of individual and societal interests called for by the Fourth Amendment. It is to this doctrine that we now turn our attention.

II. NO WARRANT IS REQUIRED TO SEARCH A CONTAINER DISCOVERED IN THE COURSE OF A LAWFUL SEARCH OF A VEHICLE

Thus far, our argument has addressed the question whether warrantless probable cause searches of relatively low privacy containers that have been lawfully seized by police, such as respondent's bag, are unreasonable per se under the Fourth Amendment in the absence of consent or exigent circumstances. If our foregoing arguments are sound, such searches comport with the Fourth Amendment irrespective of the location from which the container is seized. The argument has special force, however, in the context of the present case, where officers had probable cause justifying a warrantless search of the trunk of respondent's automobile, and the paper bag found therein was simply one of the places where they could reasonably expect to find the contraband for which they had reason to search. See *Robbins* v. *California*, *supra*, slip op. 7 (Powell, J., concurring); *id.* at 1-2 (Blackmun, J., dissenting); *id.* at 3-7 (Rehnquist, J., dissenting); *id.* at 1-3, 5-6 (Stevens, J., dissenting); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 767-768 (Bur-

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exterior, the context within which it is discovered, and whether the possessor has taken some significant precaution * * * that indicates a desire to prevent the contents from being displayed upon simple mischance." *Ibid.*

ger, C.J., concurring in the judgment); *id.* at 772 (Blackmun, J., dissenting).

A. A Search Of A Container Found In The Course Of A Lawful Warrantless Automobile Search Is An Integral Part Of The Search Of The Automobile

It is well established that the privacy interest in an automobile and its contents is sufficiently limited that probable cause suffices to justify a warrantless search of its interior, including a locked trunk or glove compartment. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 12-13; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 48-51; *Cooper* v. *California*, 386 U.S. 58 (1967); *Carroll* v. *United States*, *supra*, 267 U.S. at 153; see pages 17-18, *supra*. The reduced privacy interest that society recognizes in the interior of an automobile renders unnecessary recourse to a magistrate to confirm the officer's judgment that probable cause to search is present. If, in this case, a magistrate had issued a warrant authorizing the search of respondent's car, based upon the information received by officers that indicated that it contained contraband, it could hardly be seriously argued that a further warrant would have been required to permit the search of the paper bag found within that vehicle, or any other container that might have enclosed the contraband believed to be present. *Robbins* v. *California*, *supra*, slip op. 6 (Stevens, J., dissenting); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 573 n.7 (1978) (Stewart, J., dissenting); *United States* v. *DeSimone*, No. 79-5675 (5th Cir. Nov. 2, 1981), slip op. 12739; *United States* v. *Kralik*, 611 F.2d 343 (10th Cir. 1979); *United States* v. *Callison*, 577 F.2d 53, 55 (8th Cir.), cert. denied, 439 U.S. 873 (1978). It is our submission that the scope of the warrantless probable cause search of respondent's automobile permitted by the "automobile search" doctrine in consequence of the limited privacy interest attaching to automobiles should be no different, and, accordingly, that the paper bag seized by police in this case was properly searched without a warrant. See *Robbins* v. *California*, *supra*, slip op. 6 (Stevens, J., dis-

senting); cf. *Warden* v. *Hayden*, 387 U.S. 294, 299-300 (1967).

There is no question but that the search of respondent's automobile was supported by probable cause (see Pet. App. 19a-20a n.22). And the grounds for suspicion known to the officers who stopped respondent extended to the paper bag seized from the vehicle, which was a logical place to store the heroin that he was believed to be distributing.[23] Accordingly, as is explained above (pages 21-23), the warrant requirement does not assure judicial scrutiny of the police officer's determination of probable cause before the beginning of the intrusion—the search of the car. If the officer's assessment of probable cause is sufficiently reliable to permit the warrantless search of the car, it is difficult indeed to see why that very same assessment should be thought to require advance judicial scrutiny when applied to the paper bag. The only added inference that was drawn when the District of Columbia police searched respondent's paper bag was a relatively rudimentary one, *i.e.*, that the bag could well contain respondent's heroin. Such an inference is one professional law enforcement officers are well-situated to make; no expertise in the fine points of Fourth Amendment law is required. The basic policy that underlies the warrant requirement accordingly has little, if any, application to the search of respondent's bag. And, as is noted above (pages 22-23, *supra*), the other functions of a warrant—limiting the scope of the search and providing assurance respecting an officer's authority to the person whose property is searched—have little application to such a search.

Practical considerations militate in favor of application of the automobile exception to containers found therein. Unless law enforcement officers can examine the contents of containers found in an automobile as an incident of a vehicular search, they can never be certain that they have completed their search of the vehicle until

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[23] The informant's tip which led to the search of respondent's automobile was simply that respondent "had narcotics in the trunk of his car" (Pet. App. 14a).

they have detained the driver, secured a warrant to search the container, and executed the search. Thus, whenever the only basis for arrest is the probable cause which supports a search, and no basis for arrest has been found in the search of loose items in the car, the interposition of a warrant requirement may cause a greater intrusion into the affairs of individuals than would be necessary if the container could be searched as part of the automobile search (see pages 21-28, *supra*).

The court below (Pet. App. 18a-19a) rejected the argument that *Chadwick* and *Sanders* were distinguishable because the focus of police suspicion in those cases was upon a particular container, whose presence in a motor vehicle was fortuitous, rather than upon the vehicle itself or an integral part of it. See also *Robbins* v. *California*, *supra*, slip op. 4-5 (plurality opinion). As Justice Stevens noted in his dissent in *Robbins* (slip op. 2-3 & n.3, citing *Arkansas* v. *Sanders*, 442 U.S. at 766-768 (Burger, C.J., concurring)), however, neither *Chadwick* nor *Sanders* truly involved an automobile search. In both cases, the investigating officers had probable cause to believe that a particular piece of luggage contained contraband before it was placed in the vehicle and no basis to search the vehicle except for the purpose of locating the specific container. The Court's holding that the pre-existing obligation to obtain a warrant was not extinguished by placement of the containers in an automobile was thus quite logical, but it of course does not justify the conclusion that either of these cases precludes application of the automobile exception to searches of containers discovered in the course of a probable cause search of a vehicle. *Robbins* v. *California*, *supra*, slip op. 4 (Stevens J., dissenting)[24]

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[24] Language in *Sanders* that may appear to suggest otherwise (442 U.S. at 765 n.13; emphasis added): "[o]ur decision in this case means only that a warrant generally is required before personal luggage can be searched and that *the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.*", is dictum

As Judge Wilkey observed in his dissent, if the automobile exception is held not to embrace any containers found in an automobile, the decisions in *Robbins*, *Sanders*, and *Chadwick*, collectively have the effect of "*abolish[ing] the automobile exception to the warrant requirement as applied in narcotics cases*" (Pet. App. 78a; emphasis in original).[25] This is an ironic result, to say the least, in view of the possessor's total lack of any legitimate possessory interest that society is bound to respect in his contraband.[26] And it is doubly ironic in light of the fact that the automobile search exception was fashioned in *Carroll*, in a setting arising from the problems of inter-

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that the Court should feel free to reexamine as part of its analysis of the fundamental Fourth Amendment issues presented by this case. See *Robbins* v. *California*, *supra*, slip op. 7 (Powell, J., concurring); *id.* at 5 (Stevens, J., dissenting). See also pages 46-47, *infra*.

[25] As Judge Wilkey explained (*ibid.*):

> Traffickers do not spoon contraband powders into glove compartments or shovel them into trunks; narcotics are transported in containers * * *.

[26] Contraband is material the possession of which the law proscribes and to which "'the government is entitled.'" *Carroll* v. *United States*, *supra*, 267 U.S. at 149, quoting *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). Respondent's heroin was contraband subject to forfeiture under both federal and the District of Columbia law, as was the vehicle in which it was being transported and, for that matter, the paper bag that contained it. See 21 U.S.C. 881(f); D.C. Code Ann. § 33-417 (1973). In *Cooper* v. *California*, *supra*, 386 U.S. at 60-61, a warrantless search of an automobile was upheld based upon provisions of California law that authorized seizure and forfeiture of any vehicle used for transportation of narcotic substances. Each of these statutory provisions reflects the diminished property rights society recognizes in contraband materials, and they indicate that such materials cannot support a substantial legitimate expectation of privacy. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 153 (Powell, J., concurring). Where, as here, the wrappings in which contraband is placed do not by themselves reflect an expectation of substantial privacy respecting their contents, the ensuing search must be deemed a fortiori reasonable and permissible under the Fourth Amendment. See Pet. App. 99a-101a (Wilkey, J., dissenting).

dicting illicit trade in another controlled substance—intoxicating liquors. See 267 U.S. at 145-146.

B. Even If Some Containers Discovered In The Course Of An Automobile Search Deserve The Additional Protection Of The Warrant Procedure, There Is No Reasonable Basis For Treating Insubstantial Containers Differently From Compartments Of The Automobile

While we question whether such a decision would meaningfully advance the interests served by the Fourth Amendment, the Court could logically conclude that certain containers, such as suitcases or attache cases, are sufficiently invested with socially valued privacy attributes that their warrantless search is unreasonable even when they are discovered in the course of a probable cause search of an automoble. But the imposition of a warrant requirement respecting containers located in an automobile is logical only to the extent it can reasonably be concluded that those containers have substantial independent privacy attributes that rise above those embodied in the automobile itself and consequently command additional Fourth Amendment protection. This obviously cannot be said for the paper bag respondent used to store his heroin cache, the plastic wrapped parcel containing Robbins' marijuana, or similar containers. Certainly such containers are ordinarily considerably less likely than the glove compartment of an automobile to contain private papers or intimate personal effects. In addition, when contrasted to luggage or briefcases, such parcels, particularly when unsealed, are subject to spillage or tearing and are otherwise likely to reveal their contents as the result of being handled. Thus, it is difficult to see how such parcels could reasonably be said to support an expectation of privacy demonstrably greater than that recognized in the vehicle in which they are placed. See *United States* v. *Mackey*, *supra*, 626 F.2d at 687. The incongruity of a contrary rule is manifested by the decision of the en banc court below. Thus, although the court below acknowledged that respondent's privacy expectation

in the locked trunk of his automobile was insufficient to require procurement of a warrant as a predicate to unlocking and searching it (Pet. App. 20a), it held that, absent "special exigencies," a warrant was necessary before the officers could look into the flimsy, unsealed lunch bag they discovered within it.

Even if the placement of some kinds of containers within an automobile does not necessarily deprive their owners of the level of protection afforded to such containers in other settings, respondent's decision to carry an unsealed paper bag in his automobile, which by reason of its "configuration, use and regulation" limits the driver's legitimate expectation of privacy in its contents, *Arkansas* v. *Sanders*, 442 U.S. at 761, nonetheless reflects a failure to take such reasonable precautions to maintain his privacy as would make application of the the warrant requirement appropriate. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 152-153 (Powell, J., concurring). Accordingly, the setting in which petitioner's bag was discovered provides an additional indication that the warrantless search of the bag, found by the courts to have been based on probable cause, was a reasonable one.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submited.

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